

*In the Matter of Hector Fuentes*

DOP Docket No. 2004-2857

**(Merit System Board, decided January 11, 2006)**

The appeal of Hector Fuentes, a Senior Correction Officer, Juvenile Justice, with the Juvenile Justice Commission, Department of Law and Public Safety, of his 30-day suspension on charges, was heard by Administrative Law Judge Anthony T. Bruno (ALJ), who rendered his initial decision on August 25, 2005, reversing the suspension. Exceptions were filed on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on January 11, 2006, did not adopt the ALJ's recommendation to reverse the suspension. Rather, the Board finds that the appointing authority's action in imposing a 30-day suspension was justified.

## **DISCUSSION**

The appellant was charged with conduct unbecoming a public employee and verbal abuse of an inmate, patient, client, resident, or employee. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his June 2, 2005 initial decision, the ALJ summarized the testimony, indicating that on March 27, 2003, the appellant was serving as a Senior Correction Officer at the New Jersey Training School for Boys, Jamesburg (Jamesburg), when Grace Ribaudó, the school psychologist, overhead loud muffled voices outside her closed second-floor window overlooking an auto shop. On opening the window and looking out, she alleged that she observed a "male adult," screaming at one of two inmates in a State van, using extremely foul and vulgar language, which Ribaudó characterized as "very threatening." Ribaudó stated that she listened for about ten minutes before going downstairs to report the incident to a superior officer. After not finding one, Ribaudó allegedly walked to the auto shop where she identified the correction officer by his nametag. She stated that there was no yelling while she was outside. After identifying the officer as the appellant, she returned to her office, then noticed the yelling outside her window had resumed. Within a few minutes, she allegedly spoke by phone with the appellant's superior, Lieutenant James Mercer, who told her that he was present during the altercation, along with two Correction Officers transporting the two inmates. However, Ribaudó stated that she saw neither Mercer nor the other two officers at the scene.

On the other hand, Mercer alleged that he had been called over to the van by the appellant "within three minutes" of the van's arrival and stayed "for ten

minutes” until the van was about to depart. During this period, Mercer testified that he overheard the appellant call one of the inmates “a fucking piece of shit,” after being bombarded with yells, screams, threats, and insults by the inmate. Subsequently, Mercer intervened and directed the appellant to “knock it off” and “not to feed into the nonsense.” Mercer stated that he did not see Ribaudó by the van.

At the close of the respondent’s case, counsel for the appellant moved for a judgment of involuntary dismissal, which was granted by the ALJ, who found that Ribaudó’s testimony was not credible and that the language the appellant used towards the inmates was not abusive. Subsequently, at its July 13, 2005 meeting, the Board found that the ALJ’s granting of the appellant’s motion for involuntary dismissal was unsupported by the record and remanded the matter back to OAL for a complete hearing. Following the remand, the appellant rested his case without testifying and the ALJ again concluded, in his August 25, 2005 initial decision, that the appellant had not engaged in conduct unbecoming a public employee or verbal abuse of an inmate. Therefore, the ALJ recommended that the appellant’s suspension be reversed.

In his decision, the ALJ found that there was not “a scintilla of evidence” that the altercation was as Ribaudó had testified. Alternatively, finding Mercer’s testimony to be credible, the ALJ concluded that the fact that the appellant was being verbally abused with “disgusting language” by an inmate “bars a conclusion that [the appellant] verbally abused the inmates” by calling an inmate “a fucking piece of shit.” Although Mercer “suggested [the appellant] try a different tact” in responding to the inmates by telling him to “knock it off” and “not to feed into the nonsense,” the ALJ noted that Mercer “did not indicate [the appellant’s] response was unacceptable or abusive” (emphasis added). Therefore, the ALJ concluded that the appellant’s retort was not verbal abuse *per se* “since the inmates were using the very same language” (emphasis added). The Board questions if this is the ALJ’s version of “two wrongs make a right.” Furthermore, as he did in his earlier decision, the ALJ noted the pervasiveness of profanities and vulgarities in today’s popular culture and everyday language. In this regard, he noted that they are “words originally used to get one’s attention and now are used almost unconsciously in routine conversation.” Moreover, the ALJ analogized the “appropriate” use of verbal abuse to the appropriate use of necessary and sufficient physical force by correction officers, and found that the appellant had “communicated in the language of the inmates” in order to get their attention and “to control a potential for a serious problem.” Finally, citing testimony that described the inmates involved in the incident as “notorious” gang members “who brag of their illegal and illicit activities,” the ALJ noted that, “If verbal abuse, like harassment, is measured by the effect upon [the] recipient of the abuse, one strongly doubts the inmates viewed [the appellant’s] words as abusive.”

Upon a total review of the record, the Board accepts the ALJ's determination regarding the credibility of the witnesses. However, the Board finds that the ALJ was incorrect in using a double standard concerning the utilization of verbal abuse in a correctional setting. Specifically, the ALJ concluded that the appellant's language during the incident would be offensive, and unbecoming of a public employee – if he were speaking to “any employee, official, or visitor” to Jamesburg. The Board notes that Jamesburg has published and disseminated standards of conduct guidelines that specify, “Staff Members will respect and protect the civil and legal rights of all inmates,” and demonstrate “appropriate concern for the inmate's welfare.” Apparently, the ALJ feels that Jamesburg's inmates have a lesser expectation of civility and are owed less of a duty of reasonable official conduct than are Jamesburg employees, officials, or visitors. Furthermore, even though Mercer testified that he did not consider the appellant's retort (calling the inmate “a fucking piece of shit”) to be verbal abuse, Mercer counseled the appellant for his use of language and told him to “knock it off” and “not to feed into the nonsense.” The ALJ himself characterized the appellant's language toward the inmates as a “harangue.” Regardless of the provocations directed towards the appellant by the inmates, the appellant had a professional duty as a Senior Correction Officer to remain in control of his behavior and speech. Finally, the Board finds especially noteworthy the fact that, in his report of the incident, Mercer stated that he intervened in the incident and talked with the two inmates, calming down at least one of them, apparently without the need to resort to profanity.

Moreover, as a Senior Correction Officer, the appellant is a law enforcement employee who maintains safety and security in the potentially dangerous environment of a juvenile detention center, while promoting adherence to and respect for the law among his residents. Of critical importance is that the appellant should provide a positive role model for his juvenile residents, so that they may be rehabilitated and reenter society with a greater chance of success. Additionally, a Senior Correction Officer is held to a higher standard of duty by the public. This standard includes upholding an image of utmost confidence and trust, since Senior Correction Officers, like municipal Police Officers, hold highly visible and sensitive positions within the community. The public expects and demands prison guards to follow orders and exhibit a respect for rules, regulations, procedures, and policies. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also In re Phillips*, 117 N.J. 567 (1990). Therefore, the Board finds that there is sufficient evidence that the appellant was guilty of verbally abusing an inmate based on Mercer's observation alone and upholds the charges. Accordingly, considering the appellant's prior record<sup>1</sup> and the seriousness of his infraction, the Board concludes that a 30-day suspension is neither unduly harsh nor disproportionate to the offense.

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<sup>1</sup> The appellant's prior disciplinary history consists of a previous 90-day suspension and several minor disciplines.

**ORDER**

The Merit System Board finds that the action of the appointing authority in imposing a 30-day suspension was justified. Accordingly, the Board affirms that action and dismisses the appellant's appeal.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.